SUPREME COURT, U.S.
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No. 94-1827

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

JOHN O. ZIPPERER, JR., an individual,

Petitioner,

v.

THE CITY OF FORT MYERS, *et al.*,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the due process clause of the Fourteenth Amendment require local governments to give actual written notice to a mortgagee prior to imposing lawfully authorized and superior special assessment liens for beneficial public improvements constructed at the request of the landowner/mortgagor?

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

John O. Zipperer, Jr.

Respondents:

The City of Fort Myers, a chartered municipality and political subdivision of the State of Florida; Fort Myers City Council, as Governing Authority of the Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; Fort Myers City Council, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; Fort Myers City Council, as the Governing Authority of Improvement District No. 17; Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; Improvement District No. 15, Omni Interstate Park, Improvement District No. 17; Lee County, a political subdivision of the State of Florida; Colonial Road Extension Improvement Special District Board, as the Governing Authority of the Defendant Special District known as Colonial Road Extension Improvement Special District; and Colonial Road Extension Improvement Special District.[1]

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[1]Although not a named party, the State of Florida filed amicus curiae briefs in support of the Respondents' position in both the Court of Appeals and District Court below and has been served with this Petition.

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STATEMENT OF THE CASE

The party Respondents referred to as Colonial Road Extension Improvement Special District Board, as the governing authority of the Dependent Special District known as Colonial Road Extension Improvement Special District, and Colonial Road Extension Improvement Special District were formed by Lee County, a political subdivision of the State of Florida, and shall be referred to collectively as "Lee County."

Lee County does not dispute the general presentation of Petitioner's rendition of the facts and procedural history of this case, except as noted below.

Lee County, along with the City of Fort Myers (hereinafter "governmental entities"), created by properly enacted resolutions pursuant to Chapters 125, 170, 189, Fla. Stat., special assessment districts to levy assessments (in conformity with Chapter 197, Fla. Stat.) to finance public improvements on real property within the governmental entities' jurisdiction. A portion of these properties were previously the subject of Mr. Zipperer's first mortgage ~~lien~~. The public improvements, which were requested by the property owner/mortgagor, consisted of sewers, potable water, roadways and drainage areas.

Mr. Zipperer concedes these special assessment districts and the adoption and imposition of the assessments, were lawfully enacted and followed the requirements of applicable state statutes. Moreover, Mr. Zipperer has never challenged the legality of the applicable state statutes. Lee County's expenditures for the benefit of

all landowners in the special assessment district exceeded $4 million, and on the subject property, which Mr. Zipperer now owns, over $1 million.

Lee County disputes Mr. Zipperer's characterization of the improvements constructed by the Respondents as "worthless highways, sewers and waterlines which would never have been built through normal commercial institution lending." (Petition for Writ, p. 5-6) Mr. Zipperer never raised an objection in the proceedings below as to the lack of benefit contributed by the improvements, nor the resulting enhancement to the real property in question. He never claimed the special assessment liens for the improvements were confiscatory.

Moreover, Lee County disputes Mr. Zipperer's claim these liens are a "super priority." (Petition for Writ, p. 6) The special assessment liens are given priority status under state law, which he does not challenge. §170.09, Fla. Stat.

SUMMARY OF ARGUMENT

Reasons For Denying A Writ

Mr. Zipperer complains the state-authorized procedures followed by Lee County and Fort Myers in imposing special assessment liens for roadways and utility purposes violated his due process rights under the Fourteenth Amendment.

The state procedure followed by the governmental entities permitted ordinances and resolutions to be adopted which imposed special assessment liens superior to any existing liens, for beneficial public improvements constructed on the subject property. The improvements constructed in this case consisted of infrastructure which was requested by the landowner/mortgagor. When these special assessments were enacted, the governmental entities followed statutory procedures, which did not require actual written notice of the proposed action be given Mr. Zipperer as a mortgagee. Notice was given to the public as a whole by publication as well as actual notice to the landowner(s).

Mr. Zipperer claims these procedures violated his rights under the Fourteenth Amendment. The District Court as well as the Eleventh Circuit Court of Appeals disagreed. These courts rejected Mr. Zipperer's reliance on *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), as authority for his due process claim. The lower courts noted Mr. Zipperer was permitted to foreclose his mortgage and acquire the property in its enhanced condition. His property interest, which consisted of his mortgage, was never impaired. Consequently, no due process claim existed. Both courts relied on *Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991).

ARGUMENT

The central issue for consideration by the Court is whether the Eleventh Circuit Court of Appeals properly concluded Mr. Zipperer had no constitutional due process right.

This Court is urged to uphold the Eleventh Circuit Court of Appeal's reliance on *Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991), which is uncontradicted by decisions in the other circuit courts of appeal.

Lee County submits the decision in *City of New Iberia* is persuasive and should be followed by this Court to deny the writ. In the Fifth Circuit case, the holder of a real estate mortgage challenged the imposition of a special assessment lien levied by a local governmental entity. The assertion was that a "taking" of the mortgage interest resulted from imposition of the lien without giving the mortgagee actual notice.

The mortgagee, as Mr. Zipperer does in this case, argued the governmental entity was required by the due process clause of the Fourteenth Amendment to give it, or its predecessor in title, actual notice of any intended special assessment, and failure to do so resulted in impairment of the mortgagee's property interest without due process of law.

The Fifth Circuit held there was no "taking" and no deprivation of the property interest by the local governmental entity. In ruling against the mortgagee, the court stated:

> The mortgagee's interest in the property is derivative from that of the owner. To allow the mortgagee to assert an unconstitutional taking because of a special assessment sought by the landowner will allow the mortgagee potentially to receive whatever benefit did result from the improvements without having to pay for them. Moreover, this claim by the mortgagee would place an impossible, if not absurd, burden upon the taxing authority: to police the landowner's request for assistance with improvements so that his mortgage will not be discomfited by the ensuing special assessments. FDIC's [the mortgagee's] implicit plea for governmental paternalism in an area normally controlled by sophisticated contractual relationships is as strange as it is unsupported by precedent.

Id. at 615-616.

Mr. Zipperer suggests for the first time in his Petition the infrastructure improvements made by Respondents were "unnecessary and ultimately worthless." (Petition for Writ, p. 10) The reason for this assertion is to stretch his improvident investment into a claim under *Mennonite*. It is clear *Mennonite* only applies if the claimant can show state action "immediately and drastically diminishes the value of this security interest." *Mennonite*,

462 U.S. at 798. By attempting to establish the improvements as worthless, Mr. Zipperer argues the underlying security for the mortgage has been devalued or destroyed, thereby triggering a due process violation.

To establish a procedural due process violation, Mr. Zipperer must demonstrate that (1) he had a property interest which was impaired by state action and (2) the state failed to use constitutionally sufficient procedures in impairing that interest. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989). In fact, the actual existence of a legitimate property interest is a precursor to the examination of any alleged procedural due process claim. *Thurston v. Dekle*, 531 F.2d 1264, 1271, *vacated* 438 U.S. 901 (1978), *on remand* 578 F.2d 1167 (5th Cir. 1978).

Although the Eleventh Circuit found Mr. Zipperer did have the prerequisite property interest in the mortgage under Florida law, it also noted there was no impairment of this interest by the Respondents' actions in following state authorized special assessment statutes. *Zipperer v. City of Fort Myers*, 41 F.3d 619, 623-24 (11th Cir. 1995).

Consequently, Mr. Zipperer could, and subsequently did, foreclose his mortgage interest, which was unaffected, and is now the owner of the property through the normal foreclosure channels. *Mennonite* would apply only if the state statute and resulting special assessment liens extinguished Mr. Zipperer's mortgage interest--changing his position from one of being a secured creditor to a general, unsecured creditor analogous to bankruptcy cases.

Likewise, Petitioner's reliance on *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), is misplaced for the same reason--the adverse impact of the state action did not result in elimination of the protected property interest. In *Tulsa Professional Collection Services*, a creditor attempted to assert a claim against a deceased's estate after expiration of a two-month window within which creditor's claims must be filed. A state statute required the filing of all creditor's claims, to be a valid claim against the estate, within two months of the date of publication of the appropriate notice.

In holding the Oklahoma state procedure as violative of the due process clause of the Fourteenth Amendment, this Court noted the probate proceedings in question extinguished the entire claim, which is not the situation for Mr. Zipperer. *Tulsa Professional Collection Services* at 577. Unlike Pope's claim, Mr. Zipperer's claim continued unabated and unaffected by the Respondents' actions. His claim has remained fully enforceable, and he subsequently executed the provisions of the promissory note and real estate mortgage with the previous landowner and is now the record owner of the subject property.

Mr. Zipperer also cites *Connecticut v. Doehr*, 501 U.S. 1 (1991), to support his theory that insignificant impairments to property rights support a due process clause. In *Doehr*, this court held the applicable state prejudgment attachment procedure violative of the due process clause as applied to a property owner. There is no doubt as to application of the due process clause to property owners, as attachment procedure would result in the following:

> [A]ttachments ordinarily cloud title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause.

Id., 501 U.S. at 2.

As noted herein, Mr. Zipperer's note and mortgage remained viable and enforceable.

CONCLUSION

The procedures followed by the Respondents in adhering to state law do not constitute a violation of the Fourteenth Amendment due process provisions. Consequently, the mortgagee is not entitled actual notice prior to imposition of the special assessment liens.

This Court should uphold the decision of the Eleventh Circuit Court of Appeals below and the substance of the decision in *Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991), by denying Petitioner's writ for certiorari.

Respectfully submitted,

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